JD–33–14
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS, HEALTH &
WELFARE AND PENSION FUNDS Case No. 13–CA–117018

and

LOCAL 743, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Jason Patterson, Esq.
for the General Counsel.
Albert M. Madden and Andrew J. Herink, Esqs.
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 22, 2014. Teamsters Local 743 filed the charge in this matter on November 14, 2013. The General Counsel issued the complaint on February 18, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent administers the health, welfare and pensions plans of various employers, including United Parcel Service. Respondent provides services in excess of $50,000 to employers who were directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by threatening employee Frederick Allen Moss with a 3-day suspension unless he removed a written disciplinary warning that Moss had posted in his work area. It also alleges that by Respondent violated Section 8(a)(1) by promulgating a rule prohibiting employees from posting written disciplinary warnings in their work area.

Frederick Allen Moss has worked in Respondent's call-in center for 21 years. His job is to answer inquiries by fund participants. For the last 7 years Cynthia McGinnis has supervised Moss. McGinnis considers Moss to be a marginal employee at best.

During a meeting for a group of employees on June 12, 2013, Moss apparently used a tablet (electronic device) and failed to stop using it when McGinnis told him to do so. On June 13, 2013, McGinnis held a meeting with Moss and union steward Richard Delgado. At this meeting she issued Moss a written warning for insubordination for failing to put away the tablet the day before. Immediately after the meeting Moss discussed the warning with union steward Delgado. The Union filed a grievance concerning the warning on June 13.

On June 14, Moss showed the warning to several other employees. Then he laminated the written warning and posted it in his cubicle, next to his computer. The laminated warning was visible to other employees entering his cubicle or standing at the entry to the cubicle. He also at this time, or previously, posted his quarterly production statistics, which included a note from McGinnis critical of his performance.

At a grievance meeting on August 15, 2013, McGinnis complained that Moss was being disrespectful and insubordinate to her by posting the written disciplinary warning. William Schaefer, the Group Director of Respondent's participant services, told Moss that if he did not remove the warning from where he posted it, he would suspend Moss for 3 days. The Union advised Moss to comply with Schaefer's demand. Moss went to his cubicle and took down the warning notice.

Analysis

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...* (Emphasis added)."

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp*., 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683,685 (3d Cir. 1964). The object of inducing group action need not be express.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has disciplined or discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

I conclude that Moss did not engage in protected concerted activity by posting his written disciplinary warning. First of all, Moss was not enlisting the support of his fellow employees and was not posting his disciplinary action with a view of inducing group action. The Union had already filed a grievance on his behalf when he posted the warning. There is no evidence that Moss was soliciting support for his grievance by posting the warning.

The General Counsel contends that Moss' posting of the warning was a "logical outgrowth" of the filing of the grievance. I disagree. There is no evidence that Moss was seeking the support of other employees in the grievance procedure, or that posting the warning advanced his cause in the grievance process in any way. Moss did not post the grievance; thus I conclude that the relationship between filing the grievance and posting the warning is tenuous at best.

Unlike the employees in the cases cited by the General Counsel at page 6 of his brief, Moss was not posting his warning to support any union activity. For example, this case is distinguishable from *Lucky Cab Co.,* 360 NLRB No. 43 (February 20, 2014), slip opinion pages 3-4, and 7, in that employee Geberselasa, unlike Moss, had clearly engaged in protected union activity before being told not to discuss her discharge.

The fact that several employees may have asked Moss about his written warning and that he showed it to them does not mean that he was initiating or inducing group action. There is no evidence in this record, for example, that any other employees wanted the freedom to use their electronic devices in business meetings. There is also no evidence that Moss was seeking the support of other employees to protest unfair disciplinary practices in general. The subject matter of Moss' posting was a matter that concerned only Moss.

I further conclude that Moss' discipline did not become a matter of common concern simply because the Union filed a grievance about it. The grievance, Jt. Exh. 2, cites Section 2 of the collective bargaining agreement, the non-discrimination provision, as the basis for the grievance. This is no evidence that the Union claimed that Moss was disciplined in a discriminatory matter. I assume it grieved the warning on the theory that it was administered "without just cause." Thus, I conclude that the grievance was simply processed on the theory that Moss' conduct, which only concerned himself, was insufficient to warrant a written warning.

Moss testified that he posted his warning because "a lot of people had come over asking about it." McGinnis believes he did so to mock her. Even assuming that Moss posted the warning in response to the inquiries of other employees, there is no evidence that their inquiries were motivated by anything other than idle curiosity. There is no evidence that they sought to

make common cause with Moss about anything, or that he was seeking their support for any matter of common concern.

The General Counsel at page 8 of his brief also cites *Westside Community Mental Healthcenter,* 327 NLRB 661, 666 (1999) for the proposition that Respondent's threat to Moss inhibited "other employees to obtain information that could prove useful in challenging discipline they may facing." The Board's concern in that case was inhibiting the disciplined employees from obtaining such information, rather than inhibiting other employees from obtaining information to defend themselves in other disciplinary situations. Regardless, either rationale is inapplicable to this case. Moss' posting neither could assist him in defending himself or have assisted other employees in defending themselves in disciplinary situations that might arise in the future.

Respondent did not violate the Act in promulgating an unlawful work rule

The General Counsel relies heavily on *Verizon Wireless,* 349 NLRB 640, 658-59 (2007) in arguing that Respondent promulgated an unlawful work rule by telling Moss to take down his laminated warning or face suspension. That case is distinguishable in that the discipline involved in that case was imposed for protected activity. Moreover, I find that Respondent did not promulgate a rule of general applicability. Its admonition was directed solely to Moss. A statement directed at only one employee cannot generally be considered to constitute the promulgation of a work rule, *American Federation of Teachers New Mexico,* 360 NLRB No. 59, ftn. 3 (February 28, 2014). The only other employees present when Schaefer threatened Moss were four union stewards. Their presence at the grievance meeting does not turn Schaefer's statement into a work rule. There is no reason to believe that anyone understood either objectively or subjectively that Schaefer's statements were applicable to anyone other than Moss, or applied to any situation other than the particular written warning Moss received on June 13. There is no evidence that Schaefer's alleged rule was disseminated to employees, other than those at the August 15 meeting, either by Respondent or by the Charging Party Union.

This is a case that should never have been litigated. Respondent overreacted to Moss' conduct. It is hard to understand how Respondent considered Moss' posting the warning to be disrespectful or harassment of McGinnis. The warning, if anything, reflected poorly on Moss; not McGinnis. Moss' conduct did not warrant the threat of a 3-day suspension. However, the Union should not have filed the charge and the General Counsel should not have issued the complaint. Moss' conduct is so remotely related to the rights protected by the Act, that Respondent's reaction to it is something with which the Board should not be concerned,. As the Board stated in a somewhat different context in *American Federation of Musicians, Local 76 (Jimmy Wakely Show),* 202 NLRB 620, 621 (1973):

> The Board's rising case load and the problems involved in handling it could be alleviated if cases of this type were not processed.

Conclusions of Law

Frederick Moss did not engage in protected concerted activity by posting his written disciplinary warning in his office.

Respondent did not violate Section 8(a)(1) in threatening Moss with a three-day suspension if he did not take the warning down.

Respondent did not violate the Act in promulgating an unlawful work rule.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., June 5, 2014

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Arthur J. Amchan
Administrative Law Judge

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.